Filed 6/6/19 In re Andrew Q. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re ANDREW Q., a Person Coming Under the Juvenile Court Law.	B294446 (Los Angeles County Super. Ct. No. 18CCJP00855A)
MARIA R., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; LOS ANGELES DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Real Party in Interest.	

PETITION FOR EXRAORDINARY WRIT. Danette J. Gomez, Judge. Petition granted.

Los Angeles Dependency Lawyers, Inc., Law Office of Katherine Anderson, Sonia Okoreeh and Shannon Humphrey for Petitioner.

No appearance for Respondent.

Children's Law Center of Los Angeles–CLC1, Sara McCann and Dan Szrom for Minor.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Jeanette Cauble, Principal Deputy County Counsel, for Real Party in Interest.

SUMMARY

This petition for extraordinary review was filed by Maria R. (mother), the mother of Andrew, a child who was over three years old when initially removed from mother's physical custody. (Cal. Rules of Court, rule 8.452.) Mother seeks relief from orders of respondent superior court terminating her reunification services at a six-month review hearing, pursuant to Welfare and Institutions Code[1] sections 361.5, subdivision (a)(2)(B), and 366.21, subdivision (e), and setting the matter for a section 366.26 permanency planning hearing based on its finding that mother had maintained inconsistent visitation. Mother argues that the court's termination of her reunification services at the six-month review hearing was premised on an improper discretionary determination, in violation of section 361.5, subdivision (a)(2)(B). We agree, and therefore grant the petition.

---

[1] Statutory references are to this code.

BACKGROUND

In March 2018, real party in interest, Department of Children and Family Services (DCFS) filed the operative first amended petition (FAP) in the underlying matter, pursuant to section 300, subdivisions (a), (b) and (j). As sustained, the FAP alleged that mother physically abused and neglected then five-year-old Andrew and his 10-year-old brother Kevin (who is not a subject of this action), and that mother had an extensive history of and ongoing substance abuse problems, which rendered her incapable of providing regular or appropriate care or supervision of Andrew, endangered his physical health and safety, and placed the child at risk of serious physical harm and damage.[2]

A paternal aunt and uncle intermittently had provided housing for both boys, including when mother was incarcerated in August 2017 on an outstanding warrant for drug-related charges. The aunt and uncle were in the process of seeking temporary guardianship over Kevin, who felt unsafe with mother and consistently refused to return to her care. The aunt and uncle agreed to care for Andrew temporarily while mother found a job and housing following her incarceration. Mother declined the offer and took Andrew with her.

---

[2] A petition had been sustained in 2004 in a prior dependency proceeding over mother's now-adult children, involving allegations of sexual abuse, and the parents' extensive use of methamphetamine. Mother completed drug rehabilitation and parenting classes, and participated in individual and joint counseling. The children were reunified and lived with their father, and parents retained joint legal custody. Mother remained sober for 11 years, but resumed using drugs several years before this action.

DCFS' pre-detention investigation revealed that paternal and maternal relatives, and one of Andrew's adult half-siblings, shared similar, significant concerns about mother's ability to provide adequate care for Andrew. At least one relative strongly suspected that mother was involved in a physically abusive relationship. A DCFS social worker and others observed that Andrew was not always clean, nor had he been fed regularly or well. School teachers and staff ensured that Andrew received at least two meals at school. Andrew, who had limited vocabulary and reading comprehension skills, frequently was absent from or late for school while in mother's care. Both Andrew and Kevin received weekly counseling, and were wait-listed for other services. Kevin's academic performance improved after he began living with paternal relatives. Andrew, however, was performing below his academic level in all areas, due to excessive tardiness and absences. When Andrew did attend school, staff reported that he seemed "tired, hungry and a little withdrawn."

When mother met with the social worker in late December 2017, she said she had trouble getting Andrew to the bus for school on time, and was unable to afford transportation. Mother claimed that Andrew showered daily, bathed every other day, and that she fed him enough food when he was hungry. The social worker reported that mother was "cooperative, easy to engage and presented with an appropriate affect" during their meeting. She behaved appropriately with Andrew, and showed "no visible indication of cognitive impairment or substance use." Mother was homeless and confirmed her arrest earlier that year for an

outstanding warrant, after an arrest for possession of drug paraphernalia which she claimed had not belonged to her. Mother denied that either she or her boyfriend (Julian) used drugs, and asserted that she could care for her sons' basic needs with government assistance.

Mother admitted spanking her sons, but denied leaving any marks on the children or hitting them with objects. She claimed that she revoked the boys' privileges as punishment. Mother said she had supervised Andrew on all occasions but one, when a hotel security guard found Andrew wandering after mother left him alone while she took trash to a dumpster. Mother acknowledged one incident of domestic violence with Julian, for which they had each been arrested; neither boy was present. Mother's arrest records revealed three arrests in 2017, two for outstanding warrants and one for felony vandalism after a fight with an ex-boyfriend, who hit her with a vehicle.

Mother missed two scheduled meetings with a social worker in January 2018, and failed to complete a drug test. DCFS reported that mother made herself available to her sons' school, attended meetings and consented to services. During a January 31, 2018, interview with the social worker at his school, Andrew reported that he had enough to eat and felt safe with mother. The social worker did not see any marks or bruises indicating abuse or neglect.

Mother did not attend the detention hearing on February 9, 2018, and DCFS reported that her whereabouts were unknown. The juvenile court found notice proper, and detained Andrew. He was placed in the

care of the paternal aunt and uncle, who were appointed holders of Andrew's educational and developmental rights.[3]

In its March 16, 2018 Jurisdiction/Disposition report, DCFS informed that court that both boys remained in the care of their paternal aunt and uncle. Kevin told DCFS that mother had hit Andrew "with a shoe on his leg [but] wouldn't hit him that hard because he is small." Kevin shared details about mother's drug use, and how it made her "crazy." Andrew confirmed the FAP allegations that were read to him, but remained "closed off" during his interview and unwilling to talk. He did say that "Julian hit [mother] on her hair."

Regarding her arrest in 2017, mother told DCFS that she had been "really nagging" her ex-boyfriend, and was struck by the car door as he shifted gear into reverse. He had also thrown a bottle at her, but missed. Mother acknowledged last using "meth" in mid-February 2018. She used the drug three times a day on weekends with Julian in a bathroom, outside the children's presence. However, mother had left a drug pipe within the children's reach.

The adjudication hearing began on March 23, 2018. Mother appeared, was appointed counsel and denied the allegations of the FAP. The court granted mother three one-hour monitored visits per week, and continued the hearing.

On April 26, 2018, DCFS submitted a "last minute information" (LMI) to inform the court that, among other things, between March 15

---

[3] The court gave mother visits "as set forth in the minute order," but the order from the hearing does not contain a visitation plan.

and April 25, 2018, mother had attended four visits with Andrew, and missed two others.

On May 21, 2018, the juvenile court sustained the FAP, in part. Proceeding to disposition, the court ordered mother to complete parenting and drug/alcohol programs with aftercare, undergo random/on-demand drug and alcohol testing, and gave her two-hour visits, three times per week.

An initial six-month review hearing was conducted on November 26, 2018. DCFS reported that mother had not complied with her case plan, was not undergoing drug testing nor seeking treatment. In July 2018, mother admitted using "crystal meth." As of late September 2018, mother remained homeless, and told DCFS she felt "like giving up."

A contested six-month review hearing was held on December 3, 2018. (§ 366.21, subd. (e).) DCFS reported that during the previous six-month review period, mother's visitation with Andrew had been "inconsistent"; she cancelled some scheduled visits and others had to be cancelled after she failed to arrive on time. Specifically, mother had eight visits with Andrew from May through mid-October, 2018, and missed eight other visits during the same time frame. The boys' paternal aunt said Andrew no longer wanted visits with Mother. He liked visiting with her, but it made him sad when mother did not show up. During this period, mother remained homeless and unable to provide necessities or care for Andrew, and did not comply with her court-ordered case plan. However, mother did participate in two Child

and Family Team Meetings, was cooperative with DCFS and expressed a consistent desire to reunify with Andrew.[4] DCFS reported that Andrew had "progressed tremendously in his school attendance and school grades" since being placed in the home of his paternal relatives. DCFS informed the juvenile court that mother remained "unable to prove her sobriety," and opined that the risk to Andrew of future abuse and/or neglect if returned to mother's care was "Very High." DCFS recommended that the court terminate mother's reunification services.

DCFS's counsel argued that termination of reunification services was warranted under section 361.5, subdivision (a)(2)(B), because mother failed to participate in available services, and her visitation had been inconsistent.

Mother's counsel requested that the court extend reunification services to enable mother to receive the benefit of the full 12 months of reunification services to which she was entitled. Mother's counsel noted that DCFS's request to terminate reunification services was premature. Counsel pointed out that this was not a case in which mother failed entirely to visit Andrew, which is what section 361.5, subdivision (a)(2)(B) requires to justify termination of reunification services at the six-month review hearing for a child who, like Andrew, was over three years old at the time of removal. (§ 366.21, subd. (e).) Rather, mother

---

[4] In November 2018, mother told the social worker she believed she was having a nervous breakdown. She understood she had behaved inconsistently during this case, but was ready to fight for Andrew.

had visited Andrew several times during the prior review period, albeit inconsistently.

The juvenile court terminated reunification services. The court reasoned that: "361.5 subdivision [(a)(2)(B)] . . . indicate[s] the court can terminate family reunification services if the parent has failed to contact and visit the child. [DCFS's section 366.]21(e) report indicates that mother has visited a total of eight times, . . . over the period of the last approximately seven to eight months. . . . The court is going to go ahead and exercise its discretion and find that *based on 361.5(2)(b) [sic], that Mother has failed to have consistent contact and visitation with the child*." (Italics added.)

The court set the matter for a permanency planning hearing. (§ 366.26.) Mother's counsel timely filed a Notice of Intent to File a Writ Petition. Subsequently, this Court issued an Order to Show Cause.

DISCUSSION

Mother contends that the trial court erred when, at the six-month review hearing, it summarily terminated reunification services short of the 12 months to which she was at least facially entitled under section 361.5, subdivision (a)(1)(A). Mother is correct.

1. *The Standard of Review*

In the case of a child who was over age three at the time of removal from parent's custody, at the six-month review hearing, "the

court must continue to offer reunification services pending a further review hearing unless it finds by clear and convincing evidence that an exception applies." (*S.W. v. Superior Court* (2009) 174 Cal.App.4th 277, 281; 366.21, subd. (e).) Here, the juvenile court exercised its discretion to terminate reunification services for mother based on its finding that she "failed to have consistent contact and visitation with" Andrew during the six-month review period.

Ordinarily, we review the juvenile court's findings for substantial evidence, and its decision-making process based on those findings for abuse of discretion. (See *San Joaquin Human Services Agency v. Superior Court* (2014) 227 Cal.App.4th 215, 223.) However, a court abuses its discretion when it applies incorrect legal standards. (*In re Shannon M.* (2013) 221 Cal.App.4th 282, 289.) We review such legal issues de novo. (*Id.* at p. 288.)

As we explain, the court applied an incorrect standard in terminating reunification services under section 361.5, subdivision (a)(2)(B), and substantial evidence does not support such a termination.

2. *Absent Circumstances Not Pertinent Here, Mother was Statutorily Entitled to 12 Months of Reunification Services*

"[F]or a child who, on the date of initial removal from the physical custody of his or her parent . . . , was three years of age or older, court-ordered [reunification] services shall be provided beginning with the dispositional hearing and ending 12 months after the date the child entered foster care as provided in Section 361.49." (§ 361.5, subd.

(a)(1)(A).) The section 361.5, subdivision (a) "clock" begins to run upon entry of a disposition order removing the child from his parent, and placing him in the custody of someone else. (*In re A.C.* (2008) 169 Cal.App.4th 636, 650; accord, *In re T.W.* (2013) 214 Cal.App.4th 1154, 1165.) Reunification services end 12 twelve months after he enters foster care, as provided in section 361.49.[5] (§ 361.5, subd. (a)(1)(A).)

Andrew was removed from mother and placed in his relatives' custody at the dispositional hearing on May 21, 2018. Using this date, mother's entitlement to reunification services would expire 12 months later, on *May 21, 2019*. Under section 361.49, however, it is arguable that Andrew "entered foster care" as early as April 6, 2018, 60 days after DCFS first removed him from mother's physical custody. Using that date, mother's court-ordered reunification services would end no earlier than *April 8, 2019*. (§ 361.5, subd. (a)(1)(A).)

Once a child has been declared a dependent of the juvenile court and placed under court supervision, the child's status must be reviewed every six months. (*Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 303.) Initially, reunification services must be granted to the parent unless special circumstances dictate otherwise. (§ 361.5, subd. (a)(1); *In re Ethan C.* (2012) 54 Cal.4th 610, 626.) For a child over three years old at the time of removal who is not returned to his parent's care at the six-month hearing, services will be extended so long as the parent is

---

[5] As pertinent here, under section 361.49, a child "enter[s] foster care on . . . the date that is 60 days after the date on which the child was initially removed from the physical custody of his or her parent."

attempting to participate in his or her reunification plan, and has visited the child. (*M.C. v. Superior Court* (2016) 3 Cal.App.5th 838, 842–843, 849 (*M.C.*); §§ 361.5, subd. (a)(2)(B), 361.21.) By the time of the 12-month review hearing, however, the court may extend reunification services only if it finds there is a substantial probability the child will be returned to the parent by the time of the 18-month review hearing. (*In re Dakota J.* (2015) 242 Cal.App.4th 619, 631–632.)

The juvenile court lacks the discretion to terminate reunification services except in compliance with statutory procedures. Effective 2009, amendments to sections 361.5 and 388 effected a "major policy change" away from the view that the reunification timelines were maximums. (Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2019) § 2.129[1], p. 2-488.) Among other things, the purpose of this legislative change was "to afford parents '*a minimum of . . . 12 months of reunification services for children over the age of three*.'" (Assem. Com. on Human Services, Analysis of Assem. Bill No. 2341 (2007–2008 Reg. Sess.), italics added.) To that end, the changes were designed to "'continue to allow courts to change, modify or set aside initial orders for reunification services, but *would narrow the instances in which the court could use this discretion* to those in which changed circumstances or new evidence, if available at the time of the disposition hearing, could have lead [*sic*] the court to bypass reunification services.' [Citation.]" (*M.C., supra,* 3 Cal.App.5th at pp. 846–847, italics added; *T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229, 1254, fn. 15.)

As stated in in *M.C., supra*, 3 Cal.App.5th at page 848, "[s]ection 361.5 . . . now specifies that '[a]ny motion to terminate court-ordered reunification services prior to' the six-month hearing for a child under three or the twelve-month hearing for a child over three 'shall be made pursuant to the requirements set forth in subdivision (c) of Section 388.' (§ 361.5, subd. (a)(2).) However, such a motion 'shall not be required' for the court to terminate services at the six-month review hearing if the court 'finds by clear and convincing evidence one of the following: [¶] (A) That the child was removed initially under subdivision (g) of Section 300 and the whereabouts of the parent are still unknown. [¶] (B) That the parent has failed to contact and visit the child. [¶] (C) That the parent has been convicted of a felony indicating parental unfitness.' (§ 361.5, subd. (a)(2)(A), (B), (C); see § 366.21, subd. (e)(5).)" Thus, "the six- and 12-month reunification periods in section 361.5, subdivision (a)(1), are mandatory and can only be cut short through the procedure set forth in section 388 or at the six-month review hearing if the court finds by clear and convincing evidence one of three circumstances [of section 361.5, subdivision (a)(2) justifying termination] exists." (*Id.* at p. 849.)

In the instant case, without a section 388 petition having been filed by DCFS, the court terminated reunification services under 361.5, subdivision (a)(2)(B). That provision applies when "the court finds by clear and convincing evidence . . . [t]hat the parent has failed to contact and visit the child." (§ 361.5, subd. (a)(2)(B); see *S.W. v. Superior Court, supra,* 174 Cal.App.4th at pp. 282–283.)

For the purpose of discussion, we assume the "clock" for reunification services in this case began to run on April 6, 2018. (§§ 361.5, subd. (a)(1)(A), 361.49.) The order terminating reunification services was entered on December 3, 2018, about eight months later. It is undisputed that mother visited Andrew eight times between May and October 2018.

We conclude that the court lacked authority under section 361.5, subdivision (a)(2)(B) to summarily terminate reunification services on December 3, 2018. First, the court used the wrong standard. It expressly found that it was terminating services because mother "failed to have *consistent* contact and visitation with the child." (Italics added.) But the statutory standard does not permit termination based simply on a failure of "consistent" contact and visitation. It requires a finding that the parent has "*failed* to contact and visit the child" (§ 361.5, subd. (a)(2)(B), italics added), a standard not met by mere inconsistency in contact and visitation.

Second, there is not substantial evidence in the record to meet the standard of section 361.5, subdivision (a)(2)(B). The record demonstrates that, unlike the cases on which DCFS relies, this is not a case in which a parent made either no or insubstantial efforts to contact and visit the child for six months. (See e.g., *Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1006, 1010 [parent's sole visit had to be terminated due to her inappropriate behavior, and parent's second attempt to visit denied entirely because she was under the influence of drugs]; *In re Katelynn Y.* (2012) 209 Cal.App.4th 871, 881 [for six

months, mother failed to participate in services and sought no visits with child]; *In re Tameka M.* (1995) 33 Cal.App.4th 1747, 1754 [parent's single, merely incidental, "visit" with child at paternity testing site was "insufficient to contradict the court's finding of no contact or visitation for purposes of setting a section 366.26 hearing"]; *In re Monique S.* (1993) 21 Cal.App.4th 677, 683 [mother refused all reunification services, never asked or tried to see her child, and "made absolutely no effort to reunify"].) Here, mother visited with the child eight times over a period of seven or eight months. In light of that fact, substantial evidence does not support a finding that mother failed to contact and visit the child.

Third, if, as DCFS argued, termination of reunification services was warranted at the time of the review hearing, the agency was required to file a section 388 motion, supported by evidence demonstrating why notwithstanding her visits, mother's failure to comply with her case plan or other factors warranted termination of reunification services. The juvenile court did not address any aspect of mother's noncompliance with her case plan. Its sole stated basis for termination of reunification services was mother's inconsistent visitation.

//

//

//

//

//

DISPOSITION

The petition for extraordinary relief is granted. On remand, the juvenile court is directed to vacate the permanency hearing and to determine whether to order additional reunification services for mother under section 361.5. If the court determines that reunification services are required, it shall order up to 12 months of services. Nothing in this order shall be construed as limiting the court's discretion to terminate reunification services in accordance with the law governing dependency actions. This opinion shall become final immediately upon filing. (Cal. Rules of Court, rule 8.490(b)(2)(A).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

COLLINS, J.

CURREY, J.